Louisiana Law Review

Volume 37 | Number 2
The Work of the Louisiana Appellate Courts for the 1975-1976 Term: A Symposium
Winter 1977

Private Law: Torts

William E. Crawford
Louisiana State University Law Center

TORTS

*William E. Crawford**

JUDICIAL DRAM SHOP LAW

In *Pence v. Ketchum*[1] the Louisiana Supreme Court found a cause of action stated by allegations that the operators of a bar served plaintiff an excessive amount of alcoholic beverages, put her out of the bar in a helpless state, and permitted her to attempt to cross a highway in her impaired condition, which resulted in her injury. The court thus adopted judicially what amounts to the germ of a "dram shop act" or "civil damage act." It expressly overruled its earlier decision in *Lee v. Peerless Insurance Co.*,[2] which held that the serving of drinks to an intoxicated patron was not the proximate cause of his subsequent injury in circumstances similar to those of the instant case.

The court said that defendant breached at least two duties he owed to plaintiff: (1) "the statutory duty of a retailer of alcoholic beverages not to serve alcoholic beverages to an intoxicated person and (2) the duty of a business invitor to avoid an affirmative act increasing the peril of his intoxicated patron."[3] The statutory duty arises from the court's interpretation of LA. R.S. 26: 88(2), which prohibits a retailer of alcoholic beverages from serving or selling such a beverage to an intoxicated person. The second duty referred to by the court is derived in Louisiana from the concept of fault under LA. CIV. CODE arts. 2315 and 2316. Under this duty, one may not take affirmative steps to create an unreasonable risk of injury to a person that he may be struck by an automobile enjoying the status of a business invitee of the tortfeasor.

Based upon long-existing jurisprudence,[4] the second duty stated above furnished a cause of action for plaintiff without the court's invoking the statutory rule against serving drinks to an intoxicated person. The court went further, however, and announced the new duty in Louisiana by interpreting the liquor retailers' statute to contemplate protection of a bar patron against the risk of harm arising from a bar owner's serving him when he is intoxicated.

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* Professor of Law, Louisiana State University

1. 326 So. 2d 831 (La. 1976). Noted, 37 LA. L. REV. 617 (1977).
2. 248 La. 982, 183 So. 2d 328 (1966).
3. 326 So. 2d at 835.
4. *Id.* at 836.

The breach of this statutory duty occurred when the bar owner served liquor to the intoxicated plaintiff, and was not dependent upon the subsequent wrongful ejectment. The wrongful ejectment is not therefore an essential element of the action by the intoxicated patron against his supplier.

While the opinion characterized the duty against ejectment under article 2315 as one falling into the business invitor-invitee category, it would not seem to present a problem that a few months after the instant decision the court in *Cates v. Beauregard Electric Cooperative, Inc.*,[5] abolished the invitee-licensee-trespasser categories as being of little help in applying article 2315. It may be assumed that the duty here held to come from the business invitor-invitee relationship can be easily found to flow from the concept of fault under the provisions of article 2315.

Since Louisiana has now entered the dram shop litigation arena, it might be helpful to note what some other states have experienced with this type of litigation.[6] The parties having an action for violation of the Dram Shop Act and the damages which may be claimed vary according to statute. The bulk of the litigation is by third persons who have been harmed by one who is intoxicated against the supplier of intoxicants to the consumer who perpetrated the harm. Economic loss to the family of the consumer, victims injured by the consumer's negligent driving, and wrongful death cases are frequently found among the claims.[7]

Pence does not mention the risk of harm to third parties as falling within the duty imposed on bar owners by the statutory prohibition against serving an intoxicated person; however, the California court in *Vesely v. Sager*[8] interpreted a similar statute to include third persons in the class protected under the statute. Thus, when a third-party case arises, our court will probably have no trouble finding that the statute protects the third parties as well as the intoxicated person himself.[9]

Notably under the language of *Pence* regarding the duty to avoid creating unreasonable risk of harm to the patron by wrongful ejectment, supplying the first excessive drink to an intoxicated patron can also be an

5. 328 So. 2d 367 (La. 1976).

6. Approximately 25 states have a Dram Shop Act. *See* 12 AM. JUR. *Trials* § 2 (1966).

7. W. PROSSER, LAW OF TORTS 538 (4th ed. 1971) [hereinafter cited as PROSSER].

8. 5 Cal. 3d 153, 95 Cal. Rep. 623, 486 P.2d 151 (1971).

9. The typical Dram Shop Act does not afford protection to the intoxicated person but to third parties harmed as a result of the patron's intoxicated condition. *See* PROSSER at 538; 45 AM. JUR. 2d *Intoxicating Liquors* § 580 (1969); 48 C.J.S. *Intoxicating Liquors* § 435 (1947). In this respect, *Pence* goes far beyond the scope of coverage of other states.

actionable wrong under article 2315, without reliance on the liquor retailer's statute. Specifically, the opinion, referring to the article 2315 duty against wrongful ejectment, says, "the duty requires that the defendant refrain from affirmative acts which increase the peril to his intoxicated patrons."[10] The discussion following the quoted language deals with ejectment, but it would not take an overly ingenious mind to interpret "affirmative act" as being the serving of "one drink too many." Under this analysis, the duty would be derived directly from article 2315 and would not rest upon the standard of care borrowed from the statutory prohibition. *Vesely*, however, rests upon a statutory prohibition much the same as the Louisiana statute applied in *Pence*. The other significant cases advancing dram shop type liability also have relied upon a statutory violation to find the duty of protection owed by the defendant, even relying upon laws against serving minors.[11]

The nationwide expansion of liability of the suppliers of intoxicating beverages obviously has not ended. In New Jersey, the court has said,

> a jury might well determine that a social host who serves excessive amounts of alcoholic beverages to a visibly intoxicated minor, knowing the minor was about to drive a car on the public highways, could reasonably foresee or anticipate an accident or injury as a reasonably foreseeable consequence of his negligence in serving the minor. This becomes devastatingly apparent in view of the ever-increasing incidence of serious automobile accidents resulting from drunken driving.[12]

The New Jersey court found comfort in a 1971 Oregon case[13] holding that a college social fraternity was subject to liability when, as a social host, it provided too much whiskey for a minor who in a subsequent automobile accident injured his guest passenger, the plaintiff.

It seems an imperceptible step, then, to move beyond the present frontier line of a social host serving minors, which is usually prohibited by statute, and is perhaps morally reprehensible to the potential article 2315 duty in which a social host serving an adult social guest "one too many" thereby creates a foreseeable risk of injury to all who come within bumper range of the drunken guest weaving his way home in his automobile.

The court in *Pence* went to great lengths to work last clear chance into the action by the patron to absolve him of the contributory negligence which

10. 326 So. 2d at 836.

11. See cases cited in *Pence*, *id.* at 835.

12. Linn v. Rand, 140 N.J. Super. 212, 356 A.2d 15, 19 (1976).

13. Weiner v. Gamma Phi Chapter of Alpha Tau Omega Fraternity, 258 Ore. 632, 485 P.2d 18 (1971).

traditionally accompanies voluntary intoxication. A more direct and less contorted solution would flow from defining the bar owner's duty to encompass the risk that the intoxicated consumer would expose himself to a harm that materialized. Taking this solution, however, might deprive the court of some flexibility in approaching the varied factual patterns that are sure to arise.

The decisions discussed here and in the extensive dram shop litigation across the country expanding liability of the retailers of intoxicating beverages seem clearly to be a deep-pocket policy move. In the personal liability coverage under the so-called homeowner insurance package, there is obviously another deep pocket available through many social hosts. The pain and agony inflicted upon our society by the abuse of the consumption of alcoholic beverages can only be classified as one of the genuine social tragedies in history. It is a perplexing and troublesome problem to determine how the economic loss should be borne. There is no logical stopping point at the bar owner. The manufacturers of the intoxicating liquor can certainly be said to put it on the market with actual knowledge of the human wreckage that will lie around the emptied bottles. It is not suggested here that the liability should thus be spread by the courts, but it is suggested that with the beginning shot fired in Louisiana by *Pence*, the rest of the fusillade should be discharged by the legislature in the form of comprehensive legislation.

LIABILITY OF THE STATE FOR INJURIES INFLICTED BY PENITENTIARY INMATES ON OTHER INMATES

The deplorable human conditions of the state penitentiary have been prominent in the news recently while under the scrutiny of the United States District Court. In *Breaux v. State*,[14] the court again faced the outgrowth of sufficient notice of a probability of harm to an inmate to render the state liable for his death as a result of his attempt to intercede in behalf of another inmate being subjected to heinous personal treatment by two other inmates.

Louisiana jurisprudence has uniformly held[15] that while the penitentiary is not an insurer of the safety of its inmates, liability may be found when it is shown that the authorities knew or had reason to anticipate that harm would ensue and then failed to use reasonable care in preventing the

14. 326 So. 2d 481 (La. 1976).

15. Parker v. State, 282 So. 2d 483 (La. 1973); Nedd v. State, 281 So. 2d 131 (La. 1973); Raney v. State, 322 So. 2d 890 (La. App. 1st Cir. 1975); Craft v. State, 308 So. 2d 290 (La. App. 1st Cir. 1975); Bastida v. State, 269 So. 2d 544 (La. App. 1st Cir. 1972); Adams v. State, 247 So. 2d 149 (La. App. 1st Cir. 1971); St. Julian v. State, 98 So. 2d 284 (La. App. 1st Cir. 1957).

harm. Under this standard, the state was cast in judgment in only one previous appellate case.[16]

The Louisiana Supreme Court in the instant case found both that there was reason to anticipate the harm to Breaux and that prison personnel did not use reasonable care to prevent the harm after being put on notice of its probability. Significantly the court found it unnecessary to consider another potential basis for liability, that the state failed to provide a sufficient number of guards and security arrangements to assure reasonable safety to the inmates under its custody.

The case does not so much reflect a change in the rule of law applicable as it does a change in the court's willingness to let the facts satisfy the rule.

ABOLITION OF INVITEE-LICENSEE-TRESPASSER CATEGORIES

The court in *Cates v. Beauregard Electric Cooperative, Inc.*, said, "We find the common law classifications of invitee-licensee-trespasser to be of little help in applying C.C. 2315."[17] The court thus continued its reinforcement of the duty-risk tort analysis by abandoning the traditional categories applied to premises liability cases.

In *Cates* plaintiff was horseback riding with a friend on defendant's rural property when he climbed a pole to reach the electric wire at the top and was horribly injured upon touching the wire, which was still energized. The decision to abandon the traditional categories was not material to the analysis of the case, because the court found the plaintiff contributorily negligent regardless of the duty owed to him, so that the precise duty owed by the landowner became irrelevant.

England abandoned the distinction between invitees and licensees by statute in 1957.[18] The change in England did not, however, affect the tresspasser category. The statutory duty in England is the "common duty of care" to all visitors. The duty of care then varies according to the circumstances.

The category approach was thus rejected by its founding jurisdiction after a troublesome time for the English courts from the 19th century until 1957. The writings criticizing the rigid category approach to premises liability speak laudably of the law of France,[19] which handles the problem

16. St. Julian v. State, 98 So.2d 284 (La. App. 1st Cir. 1957). Justice Tate wrote the opinion in *St. Julian* and in the instant case but dissented in the two supreme court decisions finding no liability.

17. 328 So. 2d 367, 370 (La. 1976).

18. Occupiers' Liability Act, 1957 5 & 6 Eliz. 2 C.31.

19. Hughes, *Duties to Trespassers: A Comparative Survey and Revaluation*, 68

either under something akin to strict liability under article 1384 of the French Civil Code, or under the ordinary concept of fault—negligence under articles 1382 and 1383.

Rhode Island,[20] Hawaii,[21] Colorado,[22] District of Columbia[23] and Massachusetts[24] all have abolished the categories. Our courts will certainly have a much needed enhanced flexibility to do justice under the circumstances without the necessity of satisfying the ancient, rigid category requirements.

If the Louisiana court excises this body of common law the logical replacement for it will be the law of French origin reflected in our Civil Code article 2317. The French Civil Code generally has treated premises liability either as a matter of negligence under article 1382; or liability without negligence-fault under article 1384, where one is responsible for harms caused by things under his control, of which he is the guardian; or under article 1386, which makes the owner of a building liable for harm caused by the ruin of the building. Clearly the jurists of the French courts have woven this fabric of jurisprudence; it was not written as such by the redactors of the French Civil Code. Judicial sparks of ingenuity in the interpretation and application of the Civil Code have charted the path of the French law, just as the ingenuity of the American common law courts and of the Louisiana courts has fashioned our law. It is this writer's judgment that Louisiana will fare better under the reasonable man, duty-risk, approach under article 2315 than under the provision of article 2317, making one responsible for damages caused by the vice of things under his control.

PRODUCTS LIABILITY—REDHIBITION—PROOF OF DEFECT

The action of redhibition has by no means merged into delictual law but the elements of proof in some respects are so similar that the case of *Moreno's Inc. v. Lake Charles Catholic High Schools, Inc.*[25] should be discussed here.

Two air conditioning units installed in the school failed after two and a half years of operation. The original installer replaced the compressors and sued the school upon its refusal to pay for the replacements. The school in

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YALE L.J. 633, 672 (1959); Marsh, *The History and Comparative Law of Invitees, Licensees, and Trespassers*, 69 L.Q. REV. 182, 359 (1953).

20. Mariorenzi v. Di Ponte, 333 A.2d 127 (R.I. 1975).
21. Pickard v. City of Honolulu, 51 Haw. 121, 452 P.2d 445 (1969).
22. Mile High Fence Co. v. Radovich, 175 Col. 537, 489 P.2d 308 (1971).
23. Smith v. Arbaugh's Restaurant, Inc., 469 F.2d 97 (D.C. Cir. 1972).
24. Mounsey v. Ellard, 363 Mass. 693, 297 N.E.2d 43 (1973).
25. 315 So. 2d 660 (La. 1975).

turn filed a third party demand in redhibition against the Trane manufacturer of the units, based upon Louisiana Civil Code article 2503, by which the school claimed subrogation to itself of the implied warranty of fitness owed by Trane to the installer of the units. To recover in its third party demand, the school had to show that the compressors contained a hidden vice at the time of the sale. The evidence supporting the school's claim consisted solely of a showing that installation and maintenance was proper and that a unit of this type should not fail so soon when its manufacturers testified that the unit was designed to work satisfactorily for ten years.

On the foregoing facts alone, the supreme court said, "Failure of the compressor, then, by clear implication, was due to mechanical failure, which in the absence of proof of other causes, would more properly be attributed to faulty manufacture."[26] The court then explicitly stated that the plaintiff had discharged his burden to prove defect by bringing forward circumstantial evidence from which a logical inference of defect could be made.

The mode of proof by which the plaintiff discharged his burden in this case of redhibition is precisely parallel to the mode allowed to the plaintiff in the landmark products liability-negligence action of *Weber v. Fidelity & Casualty Insurance Co.*,[27] in which the supreme court found that the chemical dip applied to cattle was proved defective upon a showing that it had been used according to the directions on the container and that since the cattle receiving the dip thereafter died, a logical inference could be drawn that the dip itself was defective.

Stripped of all else, both *Weber* and *Moreno's* found proof of defect in a showing of failure of performance together with a reasonable showing of proper use. The resulting rule probably can be described as requiring the production of a preponderance of evidence showing reasonable use and failure of the product to shift the burden to the manufacturer to show that there was some cause other than the defect that brought about the failure.

The court, as a further interesting observation, found this compressor unit actionably defective after two and a half years of operation, even though the contractual warranty by the manufacturer was limited to one year. In effect, because Trane's engineers testified that the unit was designed to operate for ten years, the court accorded to the school a ten year warranty of fitness. Query: The usual warranty on the picture tube of television sets is limited to one year. If an engineering expert from a

26. *Id.* at 663.
27. 259 La. 599, 250 So. 2d 754 (1971).

television manufacturer testified that television tubes are designed to operate for ten years, would consumers, *i.e.*, television set purchasers, have actions against television sellers when the tube fails after three years of operation?

SLIP AND FALL CASES—BURDEN SHIFTED TO STORE OWNER

The Louisiana Supreme Court applied a new rule in two slip and fall cases in self-service grocery stores, *Kavlich v. Kramer*[28] and *Gonzales v. Winn-Dixie Louisiana, Inc.*[29] The court said that upon the plaintiff's showing that the fall is caused by the presence of a foreign substance on the floor of the store, the burden shifts to the defendant to exculpate itself from the presumption that it was negligent.

Prior to *Kavlich* and *Gonzales*, the law was generally stated as follows: A successful plaintiff must establish: (1) that a dangerous condition was created or maintained by the storekeeper or one of his employees; or (2) if not created by the storekeeper or one of his employees that (a) the storekeeper or one of his employees did actually have knowledge of the dangerous conditions or (b) "the dangerous condition had remained long enough for the storekeeper to have had constructive knowledge that said condition existed."[30]

It is safe to say that plaintiffs more often than not lost the slip and fall cases under the prior rule because traditionally the storekeeper showed that he periodically swept or inspected and had discharged his duty of reasonable care. Clearly penetration of the storekeeper's defense was nearly impossible for a plaintiff.

Kavlich and *Gonzales* change this barrier. Now, while the storekeeper has the defense of showing that he took reasonable protective measures, including periodic inspections to keep the aisles and floors free of substances or objects which might cause a customer to fall, a routine showing of periodic sweeping will probably not be deemed a sufficient discharge of the duty. This is not to say that the opportunity for defense is not a real one. It does give the court the opportunity in the future to demand more and greater inspections, thus rendering fewer and fewer the cases the plaintiffs will lose in this type of action.

Viewing the broad trend of the tort jurisprudence of the court in recent

28. 315 So. 2d 282 (La. 1975).

29. 326 So. 2d 486 (La. 1976). For a more detailed discussion see Note, 37 LA. L. REV. 634 (1977).

30. *See, e.g.*, Calamari v. Winn-Dixie Louisiana, Inc., 300 So. 2d 653 (La. App. 4th Cir. 1974).

years, the instant cases seem to be additional examples of the move toward liability without negligence fault. At common law it might well be called strict liability. The result may be achieved by imposing upon the defendant, according to the endeavor involved, a high standard of care, res ipsa loquitur, presumption of fault, or the shifting of the burden of going forward with the evidence, as was done in the instant cases. Changing the ease or difficulty with which one reaches the preponderance of proof to show causation or discharge of reasonable care may also be used to move the claim effectively toward liability without negligence-fault.

CIVIL CODE ARTICLE 667—PRESCRIPTION

In a scholarly decision terminating a long-simmering dispute, the court in *Dean v. Hercules, Inc.*,[31] held that the prescriptive period applicable to a claim for damages under Civil Code article 667 is the one-year period prescribed by Civil Code article 3536.

In its fully documented opinion, the court essentially concluded that since an action for damages for a violation of article 667 is very similar to an action for damages for a violation of article 2315, the prescriptive period for the one should be the same as for the other. While the court noted with approval its prior decision in *Langlois*,[32] where a violation of article 667 or 669 is considered fault within the contemplation of article 2315, so that damages are actually claimed and collected under the general tort article, rather than under articles 667 or 669, it seems that the instant opinion holds that the obligation to pay damages is conferred directly by article 667, rather than by article 2315. With its approval of *Langlois*[33] the court is certainly free to say later that the obligation to pay damages in a case like the instant one arises from article 2315, rather than from article 667.

It is crucial to make the foregoing distinction and to found the obligation on article 2315 because the survival and wrongful death actions, it may be argued with disturbing force, are limited to offenses and quasi-offenses under article 2315, and do not flow from any other obligation source. This point was raised by the writer in connection with an action for damages in redhibition and products liability, but the question has yet to be presented to the courts for resolution. The problem has its foundation in the early line of cases[34] holding that the survival and wrongful death concepts

31. 328 So. 2d 69 (La. 1976).

32. Langlois v. Allied Chem. Corp., 258 La. 1067, 249 So. 2d 133 (1971).

33. Crawford, *Products Liability—The Cause of Action*, 22 LA. B.J. 239 (1975).

34. *See* Voss, *The Recovery of Damages for Wrongful Death, at Common Law, at Civil Law, and in Louisiana*, 6 TUL. L. REV. 201 (1932).

were not part of the law of damages under the Louisiana Civil Code and which resulted in the elaborate amending of article 2315. The question is rendered even more important by the implicit approval of the court in the instant case of the notion that article 667 encompasses liability for personal injuries and for movable property. The problem is nonexistent as long as articles 667 and 669 are treated in actions for damages as standards of care for the determination of fault under article 2315.